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82-1733

NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1982

RONALD E. RASNAKE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR
WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE UNITED STATES
FROM THE SUPREME COURT
OF THE STATE OF GEORGIA

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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

I.

Does a limited number of drug courier profile characteristics without more provide sufficient cause in this case either to stop and question Petitioner, to arrest Petitioner, or to place Petitioner under custodial interrogation?

II.

Did the Georgia Courts improperly require Petitioner to surrender one constitutional right in order to assert another?

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

RONALD L. RASNAKE, Petitioner,	)	
v.	)	CASE NO. _____
STATE OF GEORGIA, Respondent.	)	

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE UNITED STATES
FROM THE SUPREME COURT
OF THE STATE OF GEORGIA

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeals and the Supreme Court of the State of Georgia, which judgment was finally entered on February 22, 1983.

OPINIONS BELOW

The case is reported as follows: Rasnake v. State, 164 Ga.App. 765 (1982); see also, Appendix "A," attached hereto. Pursuant to that decision, Petitioner timely moved the Court of Appeals for the State of Georgia for a rehearing. The Court of Appeals denied Petitioner's Motion for a Rehearing on December 15,

1982. See, Appendix "A," attached hereto. Petitioner then applied for Certiorari to the Supreme Court of the State of Georgia. The Supreme Court of the State of Georgia denied that Application for Certiorari on February 3, 1983. Said denial is attached hereto as Appendix "B." Petitioner finally moved for reconsideration on the Application for Certiorari. On February 22, 1983, the Supreme Court of the State of Georgia denied the Motion for reconsideration on the Application for Certiorari. See, Appendix "B," attached herewith.

STATEMENT OF JURISDICTION

The Supreme Court of the State of Georgia, the Court of last resort in said state, rendered a final decision in this matter on February 22, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), Petitioner having asserted below and now in this Court the deprivation of rights secured by the Constitutions of the United States and the State of Georgia.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides in pertinent part as follows:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . ."

The following portions of the Fifth Amendment to the Constitution of the United States is involved in this case:

"No person shall be. . .compelled in any criminal case to be a witness against himself. . ."

Additionally, this case also involves the following sections of the Georgia Constitution:

Article I, Section I, Paragraph X:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; . . ."

Article I, Section I, Paragraph XIII:

"No person shall be compelled to give testimony tending in any manner to criminate himself."

STATEMENT OF THE CASE

On November 13, 1981, Petitioner was arrested by Drug Enforcement Administration Agents at Hartsfield International Airport, Atlanta, Georgia, pursuant to the "drug courier profile" upon picking up his baggage at the Delta Baggage Claim area after his arrival from Orlando, Florida.

On December 3, 1981, the Clayton County Grand Jury for the State of Georgia returned a three-count

Indictment, being Case No. 11-19323-3, against Petitioner charging him with violations of the Georgia Controlled Substances Act. R-2-3.

On January 5, 1982, Petitioner filed a Motion to Suppress Evidence contending the evidence was illegally seized and elicited from Petitioner pursuant to a so-called "investigatory stop" conducted at Atlanta Hartsfield International Airport. R-20-23; see also, R-9-10 and 77-80.

On February 2, 1982, Judge William H. Ison, Clayton County Superior Court, State of Georgia, conducted an evidentiary hearing on that motion. MT-1-97. After the presentation of evidence, Judge Ison denied that motion.

Thereafter, the case came on for a Bench Trial on February 15, 1982, Petitioner having waived trial by jury. T-3-4. During the trial, Petitioner objected and moved that the items seized and statements elicited from him should not be introduced into evidence on the grounds set out in the Motion to Suppress; and further that any statements were made under duress and coercion. T-18-19, 36 and 39. The Trial Court overruled these objections and denied Petitioner's motion. T-19, 36 and 39. Upon the conclusion of evidence, Judge Ison found Petitioner guilty as charged in the Indict-

ment. T-44; see also, R-82. On February 26, 1982, Judge Ison sentenced Petitioner to confinement for a period of ten years, each count concurrent; and provided, further, that the sentence to confinement will be five years, each to run concurrent provided Petitioner pay a fine of $50,000.00 prior to release from custody. R-84. Petitioner then timely filed his Notice of Appeal.

The Georgia Court of Appeals affirmed the decision and judgment of the Trial Court below in its Opinion of November 23, 1982. Petitioner timely moved for a rehearing on the Georgia Court of Appeals' decision. Petitioner's Motion for Rehearing was denied on December 15, 1982. In denying said Motion, the Georgia Court of Appeals made no changes in its Opinion. Thereafter, Petitioner properly applied to the Supreme Court of Georgia for a Writ of Certiorari. Petitioner's Application was denied on February 3, 1983. Petitioner then filed a Motion for Reconsideration with the Supreme Court of the State of Georgia. The Motion for Reconsideration was denied February 22, 1983. Petitioner now brings this Petition from that final decision of the Supreme Court of the State of Georgia, the appellate court of last resort in said state.

All citations to the Pre-Trial Motion hearings are noted as "MT" with the page number following. Any

citation to the proceeding on the trial of the case are referred to as "T" with the page number following. Citations to the record of the Trial Court are noted as "R" with the page number following.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A LIMITED NUMBER OF DRUG COURIER PROFILE CHARACTERISTICS WITHOUT MORE PROVIDED SUFFICIENT CAUSE IN THIS CASE EITHER TO STOP AND QUESTION PETITIONER, TO ARREST PETITIONER OR TO PLACE PETITIONER UNDER CUSTODIAL INTERROGA TION.

A. The limited number of drug courier profile characteristics standing alone in this case did not provide reasonable and articulable suspicion to stop and question Petitioner.

The pertinent facts which are all important to this issue follow. Due to the limited length of this brief, however, all the facts are not set out herein but instead they may be found in Appendix "C," attached hereto and incorporated by reference.

Edward Porro, a Federal Drug Enforcement Administration agent, first saw Petitioner at Orlando, Florida, airport. MT-68. Agent Porro's first suspicions were aroused since it appeared that Petitioner's white Samsonite suitcase was relatively light in weight. MT-68. Upon further observation, Agent Porro became

more susicious by an action which Agent Porro considered significant. MT-68. Petitioner checked the locks on his suitcase three times during the ticketing process. MT-23-24, 68-70; see also, Affidavit for search warrant. MT-95-96. However, the act of checking locks on a suitcase is not listed as a profile characteristic of a drug courier.

This information, plus a description of the Petitioner and his suitcase, were telephoned to Agents Chapman and Markonni at the Atlanta Hartsfield International Airport, which was Petitioner's destination. MT-71-72. The Atlanta agents indicated that they would continue the investigation upon Petitioner's arrival. MT-72. Indeed, by the time Petitioner had arrived in Atlanta, Agent Chapman had already made a decision to interview Petitioner in Atlanta. T-28. As Agents Chapman and Markonni waited for Petitioner in the baggage claim area of the airport, they observed an individual who they "kind of thought was definitely the one" described by Agent Porro. MT-49. Petitioner was accompanied by two other men. MT-26; see also, editorial note included in the full statement of facts in Appendix "C". According to Agent Markonni, all three men appeared nervous -- not normal nervous -- like they were about to shoplift. Mt-26, 27, 28; T-27-28.

At this point, the agents had not ascertained which suitcase was Petitioner's, though they had the means to do so from the information given by Agent Porro. MT-48. Instead, they figured the chance of having two white Samsonite suitcases in the same load of luggage was slim. MT-48. As a white suitcase came out onto the conveyor carousel, the individual who the agents kind of thought was the one went to pick it up. As the individual retrieved the baggage, he immediately checked the locks. MT-26, 27, 47-48; T-6, 27-28. At this point, according to the agents, they made an independent decision that this person was suspicious. MT-47-48; T-27-28. Because the Petitioner looked nervous and he checked the locks on his suitcase, the agents stopped Petitioner. That stop plus intensive questioning eventually led to Petitioner's arrest and the seizure of certain property, Petitioner's eventual conviction and this appeal.

As is apparent from the facts set out above, no specific and articulable factors existing outside the limited drug courier profile characteristics were attributed to Petitioner before the initial stop and eventual arrest occurred.

Nonetheless, the Georgia Court of Appeals in a misleading and erroneous Opinion finds that there were

sufficient specific and articulable factors in this case to stop and question Petitioner initially. The basis for the Georgia Appellate Court's decision rests on two factors - first, the arresting officer, DEA Agent Markonni's experience, and second, the characteristics of the drug courier profile.

First as to Agent Markonni's experience, this agent's investigative methods are open to serious questions as may be seen by looking at Agent Markonni's cases in the Federal Courts. For example, see United States v. Hill, 626 F.2d 429 (5th Cir. 1980). For whatever, reason, Agent Markonni has now chosen to bring his questionable investigatory methods into the Georgia State Courts at this point in time. The choice of forum, however, does not render Agent Markonni's methods any less questionable.

Beyond the Markonni "experience", the Georgia Court of Appeals relied heavily on certain drug courier profile characteristics to uphold the trial court's decision, concluding as follows:

> "Thus, use of the DEA developed drug courier profile can provide sufficient articulable and reasonable suspicion to authorize a 'Terry-type' stop." p. 4, Georgia Court of Appeals Opinion, Appendix "A."

Two problems, one of fact and the other of law, arise out of this reliance on the drug courier profile charac-

teristics in this instance. As to the factual problem, in a downright deceptive opinion, the Georgia Court of Appeals leads the reader to believe that at the time Petitioner was stopped and questioned, several drug courier profile characteristics were known about Petitioner, including that the Petitioner had made a quick trip to a city where drugs are known to be distributed on a large scale; that Petitioner was nervous; that Petitioner carried a large amount of cash; that Petitioner was travelling under an assumed name; that Petitioner carried empty luggage; that Petitioner was in the company of two motorcycle enthusiasts; and that Petitioner checked the locks on his suitcase. Such is not true. From a careful reading of the transcript, all the agents knew at the time they stopped the Petitioner was the following -- that he was coming from Orlando, Florida; that his luggage was light; that he checked the locks on his luggage; that he acted nervous; and that he was in the company of two other individuals when he picked up his luggage. Two out of the five facts above are not even on the drug courier profile.

The Georgia Court of Appeals' unquestioning reliance on the drug courier profile, particularly a profile as sketchy as this, is misplaced particularly when the

Appellate Court below did not even address the problem of law raised by a Georgia case which was decided by this Court no so long ago. Curiously and conspicuously absent from the Georgia Court of Appeals' Opinion is the decision of Reid v. Georgia, 448 U.S. 438 (1980). In that case, this Court openly questioned the drug courier profile noting that the listed circumstances there described "a very large category of presumably innocent travelers who would be subject to virtually random seizures with the Court to conclude that as little information as there was in this case could justify a seizure." Id. at 441. The Fifth Circuit echoes this thought in United States v. Berry, 670 F.2d 583 (5th Cir. Unit B 1982), as follows:

> "Our own fear concerning use of the profile by the Courts automatically to establish reasonable suspicion we have previously expressed: because most of the characteristics are applicable as much to the innocent as to suspect individuals, the mechanistic use of the profile by the Courts without examining the totality of the circumstances could result in blanket approval of police seizures of innocent citizens. United States v. Pulvano, 629 F.2d 1151, 1155, n.1 (5th Cir. 1980). Compounding this fear is the facility with which the profile characteristics may be manipulated by overzealous law enforcement officers. This Court has, consequently, indicated that a match between the defendant and the drug profile characteristics, of itself, does not necessarily provide reasonable suspicion."

As a result, the Fifth Circuit determined in the Berry

case as follows:

> "We conclude that the profile is nothing more than an administrative tool of the police. Presence or absence of a particular characteristic on any particular profile is of no legal significance in the determination of reasonable suspicion." United States v. Berry, 670 F.2d 583, 600-601 (5th Cir. Unit B 1982). See also, in this regard, Bothwell v. State, ___ Ga. ___, (Case No. 39097, decided February 8, 1983); State v. Smith, 164 Ga.App. 147.

In essence, the State must be able to point to specific and articulable facts outside the drug courier profile characteristics which together with rational inferences drawn therefrom reasonably warrant an intrusion such as occurred here. Brown v. Texas, 443 U.S. 47 (1979); Bowers v. State, 151 Ga.App. 46, aff'd. 245 Ga. 367, 265 S.E.2d 57 (3) (1980); Hill v. State, 140 Ga.App. 121, 230 S.E.2d 336, 337 (1976).

As is apparent from the above facts, the stop here was not based on specific and articulable facts. The only basis for this stop was that Petitioner looked nervous, his suitcase was light, he checked the locks on his suitcase, and he came from a so-called drug source city.

Since the State cannot in this instance point to facts other than a very limited number of drug courier profile characteristics, the balance between the public's interest and Petitioner's right to personal security

and privacy tilt in favor of freedom from police interference. In essence, when the stop, as in this instance, is not based on objective criteria. the risk of arbitrary and abusive police practice exceeds tolerable limits. Brown v. Texas, supra; Delaware v. Prouse, 440 U.S. 648 (1979); Brinegar v. United States, 338 U.S. 160 (1949); Bowers v. State, supra.

The initial stop in this case was not authorized by a reasonable and articulable suspicion. Hence, the stop in the concourse was unreasonable at its inception and in violation of the guarantees of the Fourth Amendment to the United States Constitution and Article I, Section I, Paragraph X of the Georgia Constitution. As a consequence, any evidence gathered after this initial stop which violated the aforesaid constitutional rights should have been suppressed. By not so suppressing the evidence pursuant to Petitioner's Motion, plus the objections and motions against the introduction of evidence at trial, the State Courts erred and the decisions below should be reversed.

B. The initial stop of Petitioner based only upon drug courier profile characteristics became so coercive as to become an arrest without probable cause and the evidence discovered thereafter was inadmissible.

If this Court should get past the first problem of a stop without any suspicion, much less a reasonable suspicion, the question then becomes whether the stop of Petitioner became so coercive as to become an arrest without probable cause. The Georgia Court of Appeals panel does not address this issue at all, but rather merely states:

> " 'Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest.' Id. at 555; accord: State v. Reid, 247 Ga. 445, 449 (276 S.E.2d 617). Hence, the investigatory stop did not amount to a seizure of the person of the defendant and the subsequent voluntary confession of the defendant to current possession of marijuana provided a sufficient probable cause for the warrantless arrest." Court of Appeals Opinion, p 5.

Several problems arise in reference thereto. First, two stops occurred -- one in the airport concourse and a second stop outside the concourse when Petitioner tried to leave. Both stops occurred before Petitioner made any allegedly incriminating statements. Also, Agent Markonni in his testimony made it clear that Petitioner was not going to leave unless he ran and was able to escape. Finally, the case which the Georgia Appellate Court cites in support of its decision, State v. Reid, 247 Ga. 445, 276 S.E.2d 617 (1981), does not apply since consent to search was given in that case. No consent exists here.

In general in cases of this type, the totality of the circumstances of the case will indicate whether a reasonable person would have thought he was not free to leave, that is whether the liberty of the person to come and go as he pleases was restrained no matter how slight the restraint might be or whether the individual had voluntarily submitted to being considered under arrest without any actual touching or show of force making the arrest complete. Florida v. Royer, ___ U.S. ___ (Case No. 80-2416, decided March 23, 1983); United States v. Berry, 670 F.2d 583, 595-598 (5th Cir. Unit B 1982); Bowers v. State, 151 Ga.App. 46, Aff., 245 Ga. 367, 265 S.E.2d 57 (3) (1980); Radowick v. State, 145 Ga.App. 231, 244 S.E.2d 346, 353 (1978); Clements v. State, 226 Ga. 66, 172 S.E.2d 600 (1970).

Applying the above law to the case at hand, a temporary Terry-type stop, if it legitimately existed at all, quickly became an illegal arrest without probable cause before any supposed admission of criminal conduct was made by Petitioner.

As Petitioner moved toward the doors with his luggage, Agents Chapman and Markonni approached the individual. T-28. As the officers stopped Petitioner, the other two individuals left. MT-30. At first Agents

Markonni and Chapman flashed their badges and identified themslves as federal narcotics agents. MT-31, 77-78, T-29.

They asked Petitioner if they could speak with him. MT-31; T-6. Petitioner said, "yes." MT-31, 78; T-7. Agent Chapman asked Petitioner for his airline ticket. MT-31, 78; T-7. Agent Chapman asked if Petitioner's first name was Ed. Petitioner said it was. MT-31; T-7. Agent Chapman then asked for some identification. MT-31, 33, 78; T-7. Petitioner produced identification which showed him to be Edward Lynn Rasnake. MT-33. The name on the airplane ticket and the identification papers matched. MT-33; see, in this regard, MT-49-52, 53-55. The agents did not know at this time that the name given by Petitioner was not in fact his real name. Agent Chapman handed the papers back to Petitioner. T-7.

Throughout this procedure Petitioner, according to the two officers, appeared nervous. MT-32; T-6. After these preliminary questions, Agent Chapman went much further and well beyond the limits of a Terry-type stop. Agent Chapman explained to Petitioner that they were narcotics agents looking for people transporting drugs through the airport. MT-33, 57; T-7. Agent Chapman then asked Petitioner if he was carrying

any drugs on his person or in his luggage. MT-33. Petitioner said he was not. MT-33.

At this point, for all intents and purposes, the agents had stated that Petitioner was suspected of smuggling drugs through the airport and that he was a target of their investigation. However, as shown above, the agents had no suspicion much less probable cause for that accusation. Agent Chapman then asked Petitioner:

> "If he [Petitioner] would mind cooperating in allowing him to search his person and also his suitcase for drugs and narcotics. He indicated that it would, you know, just take a few minutes." MT-33, 57, 79.

Now not only had the agent indicated that Petitioner was suspected of smuggling drugs, but further that they did not believe him when he denied doing so, even though they had no cause to disbelieve him. In response to the request to search, Petitioner said, "what's this all about?" MT-33, 57, 84. According to Agent Markonni, there was then a lull in the conversation which was filled by Agent Markonni when he said:

> "[L]ook, if you are not carrying any drugs or narcotics on your person or in your luggage, and if you will consent to a search, I'll be pleased to tell you exactly why we walked up to you. If you are found to be carrying something illegal, then I won't be able to tell you anything. Is that okay?" MT-33-34, 57, 84.

According to Agent Markonni, Petitioner said, "okay." MT-30-34, 57. Petitioner denies that he said that. MT-84. Rather, Agent Markonni then said:

> "We can do it in a more private area to avoid embarrassment to you or we can do it here, you know, it's up to you, which do you prefer?" MT-58. See also, MT-33-34, 41, 84.

In essence, the request was couched in such a manner as to indicate two things. First, if Petitioner did not cooperate and allow the search then, that lack of cooperation would indicate his guilt in the accuser-agent's eyes. Second, Petitioner's only choice was to be searched there or at the Drug Enforcement Administration office. The officers did not tell him he was free to go if he didn't want to be searched. MT-62. They implied by the statements that they had the authority to search when in fact they did not since no suspicion much less probable cause existed at that point. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Radowick v. State, 145 Ga.App. 231, 244 S.E.2d 346 (1978); Hill v. State, 140 Ga.App. 121, 230 S.E.2d 336 (1976). The agents had by this time turned the so-called investigatory stop into an arrest without suspicion much less the requisite probable cause.

However, even if this Court should find as did the

Trial Court that Petitioner felt he was free to go, or as the Trial Court states:

> ". . .he not being under arrest, he was free to go and any reasonable person would believe he was free to go as demonstrated by the defendant walking out of the door prior to being arrested and told that he was under arrest." MT-89-90.

The investigatory stop was clearly turned into an arrest before any probable cause existed in this case.

In fact, Petitioner did pick up his suitcase and prepared to leave. MT-34. Petitioner recalls asking the agents if they had a search warrant to search his suitcase. MT-84. The agents said "no." MT-84. Petitioner then proceeded to leave the airport saying at this point, "I'd rather go somewhere else." MT-33-34, 58. Still the agents did not break off the so-called investigatory stop but continued even further beyond the limits of a Terry-type stop even though no probable cause existed to do so. According to Agent Markonni, Petitioner's action was one of those deals that kind of caught him by surprise and he walked out with Petitioner. MT-34, 58. Agent Markonni said:

> "And I told him, I said I was kind of thinking more inside than outside, but I said we can do it out here too, if you want to. . . and as you walk out the door, when you get outside the lower level, there is a concrete wall in which the door is placed and then the wall kind of tapers off on each side to a little ledge. And I said if you want to we can do

it right over there, there aren't many people out here anyway. You can just put your suitcase on the ledge." MT-34; see also, MT-58; T-8.

According to Petitioner, the agents did walk out beside him but they then blocked his passage. MT-84-85. There was no way to go around them. MT-85. The agents by their actions and their words made it clear that Petitioner was not going anywhere until he consented to the search of his person and of his luggage. Agent Markonni supports the conclusion that Petitioner was not going anywhere without being searched in his answer to the following question:

> "Q. Is it not true. . .that if he [Petitioner] tried to run he wasn't going to get anywhere?
> A. . . .he [Petitioner] could have gone backwards, there was only two of us. If it had wanted to run he could probably have given us a good shot." MT-59.

In essence, the only way Petitioner was going to leave was if he escaped -- i.e., had given the agents a "good shot." Petitioner was not able to leave voluntarily.

Having cornered Petitioner, the stop at this point, if not before, constituted a significantly greater intrusion than a brief Terry-type stop and had become so coercive as to be an arrest requiring probable cause which the officers did not have. As such, any consent

to a search or admissions after this point, at the least, were not voluntary since Petitioner was illegally arrested. Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973); United States v. Hill, 626 F.2d 429 (5th Cir. 1980); Radowick v. State, 145 Ga.App. 231, 244 S.E.2d 346, 355 (1978); Hill v. State, 140 Ga.App. 121, 230 S.E.2d 336, 338 (1976).

Indeed, the agents continued on further with questioning and badgering, all of which indicated that Petitioner was going nowhere without being searched. Petitioner was asked once more to open his suitcase and permit a search. MT-85. One of the officers said "we can either do this the easy way or the hard way." MT-85. One officer kept asking Petitioner why he was so nervous and if he was trying to hide something. MT-35, 58.

Petitioner didn't say anything, nor did he move toward the ledge. MT-35, 58. According to Agent Markonni, he just kept looking around and appeared fidgety as if he were going to take off and run. MT-35, 58. When Petitioner did not respond or make a move, Agent Markonni asked him:

> "What's wrong?
> "Is there something you are worried about in your suitcase?" MT-35, 60; see also, MT-85; T-8.

At this point Petitioner said, "I might have something on me that might get me in trouble." MT-35, 60, 85; T-8. Agent Markonni then said:

> "I don't know what it is, you know, what's in your luggage. I don't. . .if there is some small amount of marijuana, I don't think you will have any trouble. . .you will have to come with us. We will take it. But. . .the United States Treasury doesn't want to prosecute someone for a small amount of marijuana and. . .the State attorney doesn't either. . . [I]f that is your concern, don't worry about it. . .[A]re you going to let us, you know, look in your luggage?" MT-36, 60-61.

Petitioner supposedly said in response to this direct questioning and promise of leniency that he had some marijuana. MT-36, 61-62. Petitioner denied that he made that admission. MT-85.

Agent Markonni then supposedly went on to say:

> ". . .[i]f it's a small amount of marijuana, I think we can resolve the problem. . .[y]ou know we are not out here looking for small amounts of marijuana. . .[A]re you going to let us examine the contents of your suitcase and check you?" MT-37, 61.

Petitioner said, "no." MT-37, 61. However, the "investigatory stop" had turned into an arrest well before Petitioner made any alleged admissions. At no point throughout this so-called investigatory stop had the agents advised Petitioner of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). MT-61. Nor at any time did the agents tell Petitioner that he did

not have to submit to a search and he was free to go. T-62.

Upon his refusal to allow the search, the agents then grabbed Petitioner, handcuffed him and took him to the Drug Enforcement Administration office at the airport to be searched. MT-37-39, 62; T-33. Upon subsequent searches of Petitioner and his luggage, the officers found cash and certain suspected contraband which forms the basis of this criminal action.

The pertinent events of this case are very similar to the events which occurred in the case of United States v. Hill, 626 F.2d 429 (5th Cir. 1980), where the Federal Court of Appeals found that Agent Markonni had violated another passenger's Fourth Amendment rights at the Atlanta Airport. Much as in that case, the intrusion here was not limited to brief, on-the-spot questioning. See also, in this regard, Florida v. Royer, ___ U.S. _____ (Case No. 80-2146, decided March 23, 1983); United States v. Berry, 670 F.2d 583, 596-598 (5th Cir. Unit B 1982). As a result, all alleged inculpatory statements and any and all evidence seized after this second coercive stop and hence illegal arrest, must be suppressed as "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471 (1963). To say otherwise is to uphold a procedure whereby police

may arrest on suspicion only, and thereafter establish probable cause for arrest. That procedure has been disapproved. Sibron v. New York, 392 U.S. 40 (1968); Stanley v. State, 129 Ga. App. 759, 201 S.E.2d 182 (1973); see also, State v Smith, 164 Ga.App. 147, (1982). By denying Petitioner's Motion to Suppress his statements and the evidence gathered after the illegal arrest of Petitioner, and by allowing same to be introduced at trial over objection and further motion, the Trial Court and the Georgia Courts of Appeal have erred and the verdict and sentence of judgment in this case should be reversed, or at the least remanded for further proceedings.

C. Finally, even if Petitioner were not under arrest prior to his alleged admission, he was at the very least under custodial interrogation which required Miranda warnings to be given before continuing with questioning.

In addition to the above, the facts of this case argue for a finding of custodial interrogation if not upon the first stop, at least in light of the second coercive stop. As pointed out in the preceding section, the intrusion in this case was not limited to a brief, on-the-spot questioning. At the time Petitioner was re-

quested to submit to a search on location or at the Drug Enforcement Administration office, the agents had already briefly interrogated Petitioner. Petitioner, as the Trial Court found, attempted to leave but his way was blocked. That fact, plus the fact that the agents continued to insist on the search, made it evident that Petitioner was not going to leave without being searched. He was not free to leave. Petitioner's liberty at that point to come and go as he pleased was restrained, and indeed, as shown above, the circumstances surrounding the request to search indicate that Petitioner would have been physically restrained if he had refused to be searched or if he tried to leave or escape the agent's custody. If not under arrest, then, Petitioner was subject to a custodial interrogation at that point. As a result, the federal agents were required to make sure that Petitioner understood his rights under the Miranda v. Arizona, 384 U.S. 436 (1966) rule. The agents did not do so. MT-61. As a result, when the agents continued on with the line of questioning, the sole intent of which was to establish evidence of Petitioner's possible guilt of a crime, Petitioner's alleged admissions should have been suppressed. Once those alleged admissions were suppressed, the agents had no probable cause for the searches which occurred thereafter.

As a consequence, the searches thereafter were illegal, and the evidence gathered thereby also should have been suppressed as having been undertaken without probable cause. By denying Petitioner's Motion to Suppress the alleged statements and evidence gathered as a result of the subsequent searches, and by allowing same to be introduced into trial over objections and further motion, the State Courts below erred and the decision below should be reversed therefore. See, in this regard, Miranda v. Arizona, supra; United States v. Carollo; 507 F.2d 50, 52 (5th Cir. 1975); Brown v. Beto, 468 F.2d 1284 (5th Cir. 1972); United States v. Phelps, 443 F.2d 246 (5th Cir. 1971); Windsor v. United States, 389 F.2d 530 (5th Cir. 1968).

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE GEORGIA COURTS IMPROPERLY REQUIRED PETITIONER TO SURRENDER ONE CONSTITUTIONAL RIGHT IN ORDER TO ASSERT ANOTHER.

In addition to the above arguments, the Petitioner also raised the following argumenton appeal. During the Motion to Suppress hearing, the Petitioner was a witness. Upon cross-examination by the State, the Petitioner invoked the Fifth Amendment privilege against self-incrimination. The State then moved to strike the Petitioner's entire testimony. Pursuant to that motion,

the Trial Court struck Petitioner's entire testimony. MT-89. In this regard, see Appendix "D."

In so striking Petitioner's testimony, the Trial Court required Petitioner to surrender one constitutional right in order to assert another. Such a decision is intolerable under the laws of this country and under the law cited by the Georgia Court of Appeals in its opinion. See, in this regard, Simmons v. United States, 390 U.S. 377 (1968); Culpepper v. State, 132 Ga.App. 733, 209 S.E.2d 18 (1974); and Smith v. State, 225 Ga. 328, 168 S.E.2d 587 (1969).

Indeed, the Trial Court erred in this regard, even under the law cited by the Georgia Court of Appeals. The Georgia Appellate Court affirmed the Trial Court's decision in this regard by quoting a "true rule" set out in Smith v. State, 225 Ga. 328, 168 S.E.2d 587 (1969). In so quoting this "true rule," the Court of Appeals, without mention, deletes emphasis which was in the original opinion of the Supreme Court of Georgia. The quotation actually reads as follows:

> "The true rule is that when a witness declines to answer on cross-examination certain pertinent questions relevant to a matter testified about by the witness on direct examination, all of the witness' testimony on the same subject matter should be stricken. [Case citation omitted.]"

Thus, by the very law which the Georgia Court of

Appeals panel cited, when the Trial Court struck the entire testimony of Petitioner rather than the testimony only "on the same subject matter," the Trial Court abused its discretion by going beyond the bounds of the evidence laws of the State of Georgia. In turn, the Appellate Courts of Georgia also erred when they affirmed the Trial Court. The decisions on this point should, therefore, be reversed and the case remanded as a result.

CONCLUSION

For any one or all of the aforesaid reasons set out above the decisions of the Georgia Courts below should be reversed, and the judgment of conviction against Petitioner should be vacated.

Respectfully submitted,

LAW OFFICES OF
EDWIN MARGER

By: _____
EDWIN MARGER

By: _____
ROBERT O. DAVIES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a true and correct copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States from the Supreme Court of the State of Georgia, upon Robert Keller, Esq., District Attorney for Clayton County, Georgia, by depositing a copy of same in the United States Mail, with adequate postage affixed thereto, addressed to Clayton County Courthouse, Jonesboro, Georgia.

I ALSO CERTIFY that I have this day served the requisite number of true and correct copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States from the Supreme Court of the State of Georgia upon Michael J. Bowers, Esq., Attorney General for the State of Georgia, by depositing the same in the United States mail with adequate postage affixed thereto, addressed to 132 Judicial Building, Atlanta, Georgia 30334.

This 21st day of April, 1983.

ROBERT O. DAVIES

November 23, 1982

No. 64607
RONALD E. RASNAKE, Appellant
v.
STATE OF GEORGIA, Appellee

Rehearing Denied December 15, 1982
Application for Writ of Certiorari Denied February 3, 1983
Application for Reconsideration Denied February 22, 1983

QUILLIAN, Chief Judge.

The defendant appeals his conviction for three counts of violation of the Georgia Controlled Substances Act. Held:

1. Special Agents Chapman and Markonni of the Department of Justice Drug Enforcement Agency (DEA), with duty station at the Atlanta International Airport, received a call from DEA Agent Porro, on duty at the Orlando, Florida airport. Porro had seen the defendant enter the Orlando airport, "walking quickly," and "the manner in which he moved the suitcase said to me that the suitcase was relatively light in nature." He saw the defendant go to the Delta ticket counter and purchase a ticket for Atlanta. Defendant paid cash. Porro saw the defendant check both locks on his suitcase. The Delta ticket agent observed that there was no identification tag on the suitcase and asked the defendant to fill out a tag and then affixed it to the suitcase. Defendant again checked both locks on the bag and tried to move them back and forth, and when they appeared to move "he moved back like he started to walk away, and he looked like he had a thought and he stopped and he again reached down and again tried both locks." After seeing they were secure he walked away. Poro called Atlanta and gave this information to DEA Agent Chapman.

Agents Chapman and Markonni met defendant's incoming flight at the Atlanta airport. Agent Markonni has 15 years of law enformcent experience - three with the Federal Secret Service and twelve with DEA. He has made approximately 500 drug related arrests -- approximately three-fourths of them were made following

use of the "Drug Courier Profile" which involves display of characteristics commonly associated with drug traffickers. Such characteristics include quick trips to cities where drugs are known to be distributed on a large scale. Orlando, Florida is considered to be a drug source city. Other characteristics: people who are unusually nervous, carry a large amount of cash, fly under assumed names, carry little or no luggage, or empty luggage to be used to bring drugs back to their home city. Drug couriers are usually nervous, and "very deliberately looking at people in the gate area" is "something that drug traffickers can't seem . . . to avoid."

When Markonni and Chapman observed Rasnake arrive in Atlanta he was met by two bikers," "motorcycle enthusiasts," wearing blue denim and black leather jackets. All three were "very nervous." Markonni's agency had worked several cases on motorcylcle organizations involved in the smuggling of drugs and narcotics. The defendant looked for his luggage and then "would look around staring at people in the baggage claim area." His suitcase came up on the baggage conveyor and before picking it up "the first thing he did after he touched the suitcase was to check the locks to see if they were still locked." When the defendant and his companions entered the baggage security area the checker compared the ticket stubs with the ticket on the suitcase and the two "bikers" kept walking. All three were "unusually nervous" and "appeared to be looking around the area. . ." At that time the DEA agents approached Rasnake and identified themselves as federal officers and asked if they could speak to him. Rasnake said "yes." The agents were in civilian clothes and although they had weapons they were concealed. Agent Markonni testified that the Airlines took a dim view of anyone walking around the airport with an exposed weapon. They asked defendant for his ticket and for identification. Rasnake produced several pieces of identification which coincided with the name on the ticket. He "appeared extremely nervous. His hands were shaking and his breathing appeared to be affected." His nervousness also appeared in his speech. The agents explained that they were narcotic officers looking for drug couriers and requested his cooperation by allowing them to search his person and suitcase. Rasnake was told that they could go someplace which was more private and defendant said "I'd rather go somewhere else and walked out the door." Rasnake was looking around, apparently for "these two

guys and they were nowhere in sight. . ." When they saw the DEA agents approach Rasnake they had "picked up their pace and just continued out into the parking lot and did a disappearing act." Markonni pointed to a ledge and said "we can do it right over there." Rasnake did not respond and Markonni said ". . . what's wrong? Is there something that you are worried about in your suitcase? And Mr. Rasnake hesitated for a minute and he said well, he said there is something in my suitcase and I think it could get me in trouble." Markonni said, "if there's some small amount of marijuana, I said I don't think you'll have any trouble. I said you'll have to come with us. We'll take it. But I said the United States Treasury doesn't want to prosecute someone for a small amount of marijuana. . . if that is your concern don't worry about it. . . At that time he said I have some marijuana." Markonni then asked to examine the contents of the suitcase and Rasnake said "no." The DEA agents told Rasnake to come with them. Rasnake started to back away and they placed him under arrest and handcuffed him. They conducted a brief pat-down of his outer clothing and started to their office. Markonni noticed that Rasnake's boots did not "move right." He pulled up Rasnake's trouser leg and removed $25,000 from his boots. Rasnake also had what appeared to be four Methaqualone tablets in a trouser pocket.

Agents Markonni and Chapman had Rasnake confined and they went to the Clayton County courthouse and briefed investigator Roberts of the District Attorney's office. They advised him of the information received from DEA Agent Porro of Orlando and what had transpired at the Atlanta airport. This information was placed in an affidavit and signed by Roberts. Roberts appeared before a Justice of the Peace and requested a search warrant for Rasnake's suitcase. The search warrant was granted. The search of the suitcase revealed $2,800 in cash, four ounces of cocaine, some amphetamine tablets and other substances thought to be drugs. The trial court denied defendant's Motion to Suppress.

The DEA agents properly arrested the defendant without a warrant. " 'Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it - whether at that moment the fact and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient

to warrant a prudent man in believing that the petitioner had committed or was committing an offense.' "Vaughn v. State, 247 Ga. 136, 137-138 (274 SE2d 479). " 'In dealing with probable cause . . . as the very name implies, we deal with probabilities. They are not technical, they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.' Brinegar v. United States, 338 U.S. 160, 175 (69 SC 1302, 93 LE 1879). There is also a great 'difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search.' Draper v. United States, 358 U. S. 307, 311-312 (79 SC 329, 3 LE2d 327). As Judge Learned Hand said in United States v. Heitner, 149 F2d 105, 106 (C. A, 2d Cir.): 'It is well settled that an arrest may be made upon hearsay evidence; and indeed, the "reasonable cause" necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial, unless the powers of peace officers are to be so cut down that they cannot possibly perform their duties.' " Sanders v. State, 235 Ga. 425, 440 (219 SE2d 768), U.S. cert. den. 425 U.S. 976.

Agents Markonni and Chapman had trustworthy information from another DEA agent (Mitchell v. State, 239 Ga. 456, 458 (238 SE2d 100)) that defendant was coming from a drug source city, with a very light suitcase, acting very nervous, and acted in a suspicious manner by checking and rechecking both locks on his suitcase in a short period of time. The defendant's nervousness was apparent to Agents Markonni and Chapman and Rasnake's visible characteristics complied with the known characteristics of the Drug Courier Profile. "Among the circumstances that can give rise to reasonable suspicion are the agent's knowledge of the methods used in recent criminal activity and the characteristics of persons engaged in such illegal practices. Law enforcement officers may rely on the 'characteristics of the area' and the behavior of a suspect who appears to be evading police contact. United States v. Brignoni-Ponce, 442 U. S. 884-885. 'In all situations the officer is entitled to assess the facts in light of his experience.' " United States v. Mendenhall, 446 U.S. 544, 564 (100 SC 1870, 64 LE2d 497). Thus, use of the DEA developed Drug Courier Profile can provide sufficient articulable and reasonable suspicion to authorize a "Terry-type" stop. Id. at 562-563. The encounter took place in the airport concourse. The agents wore

no uniform and displayed no weapon. They did not summon the defendant to their presence but approached him and properly identified themselves. All information was requested - not demanded. "Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest." Id. at 555, Accord: State v. Reid, 247 Ga. 445, 449 (276 SE2d 617). Hence the investigatory stop did not amount to a seizure of the person of the defendant and the subsequent voluntary confession of the defendant to current possession of marijuana provided sufficient probable cause for the warrantless arrest. Rautenstrauch v. State, 129 Ga. App. 381, 382 (199 SE3d 613); State v. Perry, 234 Ga. 842, 843 (218 SE2d 559). Incident to a lawful arreast, law enforcement authorities are authorized to make a full search of the arrestee's person. Adams v. Williams, 407 U. S. 143, 149 (92 SC 1921, 32 LE2d 612); United States v. Robinson, 414 U. S. 218, 235 (94 SC 467, 38 LE2d 427); Stoker v. State, 153 Ga. App. 871, 873 (267 SE2d 295). The suspicious activities of the defendant - both in Orlando and Atlanta, his voluntary confession to possession of marijuana in the suitcase, subsequent search of his person which revealed $25,000 in cash and a controlled substance -- provided sufficient probable cause for issuance of the search warrant for the suitcase. The trial court did not err in denying Rasnake's Motion to Suppress. Smith v. State, 160 Ga. App. 690 (187 SE2d 44).

2. The defendant contends the trial court erred by forcing him to make a "Hobson's choice" of "surrendering one constitutional right to assert another." Defendant's dilemma was brought about by his election to testify as to the events which preceded his arrest and search. Following his direct examination he was cross-examined by the prosecutor. He was asked: "The Samsonite case, was that your suitcase?" Rasnake asserted the Fifth Amendment privileged against self-incrimination.

"The true rule is that when a witness declines to answer on cross-examination certain pertinent questions relevant to a matter testified about by the witness on direct examination, all of the witness' testimony on the same subject matter should be stricken." Smith v. State, 225 Ga. 328, 331 (168 SE2d 587); U.S. cert. den. 396 U.S. 1045. However, ". . . a distinction must be drawn between cases in which the asertion of the privilege merely precludes inquiry into collateral

matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination." Id at 333.

A defendant who testified is subject to cross-examination -- the same any other witness. Code Ann. § 38-415 (Code § 38-415, as amended through Ga. L. 1973, pp. 292, 294); Code Ann. § 27-405 (Ga. L. 1962, pp. 453, 454; 1973, pp. 292, 293). Counsel for the opposing party is entitled to great latitude (Isley v. Little, 219 Ga. 23 (17) (131 SE2d 623)), with the scope of such examination left to the discretion of the trial court. Moore v. State, 221 Ga. 636 (2) (146 SE2d 895).

Defendant's Motion to Suppress asserted a possessory interest in the suitcase and the trial court correctely ruled that ownership of the suitcase was relevant to the search and seizure issue. This was not a collateral matter (Howie v. Personnel Bd. of Appeals, 122 Ga. App. 276 (1) (176 SE2d 663)) but was a proper subject of cross-examination as Fourth Amendment rights may not be asserted vicariously. Rakas v. Illinois, 439 U. S. 128 (99 SC 421, 58 LE2d 387). The trial court did not err in striking the defendant's testimony following his assertion of the Fifth Amendment. Emmett v. State, 232 Ga. 110 (1) (a) (205 SE2d 231); compare Fair v. State, 140 Ga. App. 281, 282 (231 SE2d 1).

Judgment affirmed. Shulman, P. J., and Carley, J., concur.

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta,
December 13, 1982

The Honorable Court of Appeals met pursuant to adjourment.

The following order was passed:

64607 Ronald E. Rasnake v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS
OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said Court hereto affixed the day and year last above written.

CLERK

Court of Appeals
of the State of Georgia

ATLANTA, December 15, 1982

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

64607 Ronald E. Rasnake v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

CLERK.

FEB 7 1983

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta FEB 3 1983

Dear Sir:

Case No. 39539. Rasnake v. The State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur, except Smith, J., dissents.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

FEB 24 1983

Clerk's Office, Supreme Court of Georgia

ATLANTA FEB 22 1983

The motion for a ~~rehearing~~ reconsideration was denied today:

Case No. 39539. Rasnake v. State

Smith, J. dissents

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

February 23, 1983

39539. RASNAKE v. THE STATE

SMITH, Justice, dissenting.

I would grant the motion for reconsideration of appellant's petition for certiorari. In my view the circumstances of this case, particularly the use of the so-called "drug courier profile," do not demonstrate reasonable suspicion to stop appellant or probable cause to search appellant and his suitcase are required by the Fourth Amdnement. See my dissent in Bothwell v. State, Ga. (No. 39097, decided Feb. 8, 1983, motion for rehearing denied Feb. 22, 1983). Theretofore the search was unauthorized and appellant's motion to suppress evidence seized by the DEA agents should have been granted.

FACTUAL BACKGROUND

On November 13, 1981, Edward Porro was employed by the Drug Enforcement Administration at the airport in Orlando, Florida. MT-66. On that date, Agent Porro, while on duty at the airport, saw Petitioner come through the terminal. MT-68. Apparently what first drew Agent Porro's attention to Petitioner was the manner in which he was carrying a white Samsonite suitcase, as if it were relatively light in nature. MT-68. Mr. Porro then positioned himself behind Petitioner as he waited to be taken care of at the Delta ticket counter. MT-68. While waiting, Petitioner checked the locks on his suitcase. MT-68. Agent Porro considered this significant. MT-68. As Petitioner was being taken care of by ticket personnel, Agent Porro overheard and watched the whole transaction. MT-68. Mr. RASNAKE said he had a reservation to fly to Atlanta on the Delta flight leaving at 5:00 P.M. MT-69. Petitioner paid cash for the ticket when it was presented. MT-69. Petitioner filled out an identification sticker for the bag he wanted checked. MT-69. After doing this, the ticket counter person asked Mr. RASNAKE for some identification. MT-69. Petitioner produced what appeared to be a Tennessee driver's license in the name of Ed Rasnake. MT-69.

The ticket agent looked at it, thanked him and handed him the ticket. MT-69. Mr. RASNAKE reached down again and put his hands on the locks on the suitcase. MT-69. Petitioner then moved back as if to start to walk away. MT-69-70. Petitioner looked, according to Agent Porro, like he had a thought, stopped and again reached down and tried both locks. MT-70. Then he just walked away from the counter. MT-70. Two other agents were nearby and proceeded to follow Petitioner. MT-70.

Agent Porro went down to the baggage loading area. MT-70. As he was going down to that area, he saw what appeared to be the same white Samsonite suitcase going down the conveyor. MT-70. When one of the baggage personnel saw the agent coming, he picked the luggage up. He looked at Agent Porro and said, "yeah, it is real light," and handed the bag to the agent. MT-70. Agent Porro examined the exterior of the suitcase, copied down the claim check number, and examined Petitioner's handwritten identification sticker. MT-70. The agent placed his nose along the outside seam of the bag to see if he could detect any narcotics odors. MT-70-71. The agent could detect some odors but he couldn't tell what it was. MT-71. The agent then returned the bag back to the Delta

baggage person and told him to let it proceed on its normal routing. MT-71.

Agent Porro then went back to the ticket counter and asked to check the reservation information. MT-71. There he learned that the reservation was made earlier, he believed around 2:00 or 2:30 in the afternoon. MT-71. There was no phone contact left, and it showed the person making the reservation was enroute to the airport to fly out. MT-71. Agent Porro went back to the Drug Enforcement Administration office at the airport and met with the other agents who had followed Petitioner. MT-71.

The two agents had apparently lost sight of Petitioner in the crowd of people at the airport. MT-71. Therefore, they proceeded directly to the gate area where the flight was boarding. MT-71. They told Agent Porro that Petitioner was one of the very last to board the plane, just moments before it left. MT-71. Then Agent Porro called the Atlanta Airport Drug Enforcement Administration group, and advised Agent Markonni and Agent Chapman of his observations. MT-71-72. The Atlanta agents indicated they would continue the investigation upon Petitioner's arrival. MT-72.

The Atlanta agents did not go to meet the arrival

of the flight at the gate since the day was unusually busy. MT-25. Instead, they chose to wait in the baggage area since it appeared Petitioner was concerned about something in his luggage. MT-25. The agents observed an individual arrive in the baggage claim area who they "kind of thought that he was definitely the one" from Agent Porro's general description. MT-49. Petitioner was accompanied by two other men. MT-26.

One further editorial note on the Georgia Court of Appeals' decision needs to be inserted here. The Georgia Court of Appeals, without any evidence except Agent Markonni's mere presumption, classified the individuals accompanying Petitioner as "two bikers, 'motorcycle enthusiasts'." The Court of Appeals' Opinion goes through a song and dance in an attempt to bolster its Opinion when it states as follows:

> "Markonni's agency had worked several cases on motorcycle organizations involved in the smuggling of drugs and narcotics."

The problem with this statement by the Court of Appeals is several fold. No evidence on the record over and above Markonni's presumption demonstrated (a) that these individuals were motorcycle enthusiasts, much less bikers; (b) that these individuals belonged to any motorcycle organization, much less the organizations investigated by Markonni's agency; and (c) further,

nothing on the record shows that these individuals were involved in the motorcycle organization cases which Markonni's agency had worked. Consequently, the obvious implication which the Court of Appeals attempts to make is simply unfounded in the record. The only other conclusion that can be deduced is that because Agent Markonni's agency worked several cases on motorcycle organizations, all persons who appear to Agent Markonni to be bikers (motorcycle enthusiasts) are to be immediately suspected of smuggling drugs. That logic is obviously fallacious.

In any event, getting back to the actual facts in this case -- according to Agent Markonni, all three persons appeared to be nervous in the baggage area -- not normal nervousness -- like they were about to shoplift. MT-26, 27, 28; T-27-28. Even though the agents had a claim check number from Agent Porro, they had not attempted to find or identify any particular piece of luggage as being the luggage about which Agent Porro had phoned prior to the luggage coming out on the conveyor carousel. MT-48. Rather, the agents figured the chances of having two white Samsonite suitcases in the same load of luggage were slim. MT-48.

As a white suitcase came up onto the conveyor carousel, the person that the agents "kind of thought

was definitely the one" got the bag and immediately checked the locks. MT-26-27, 47-48; T-6, 27-28. According to Agent Markonni, the individual picking up the suitcase appeared more concerned about something in the suitcase than a normal passenger would in checking the locks so frequently. MT-28-29.

Indeed, up until the individual picked up the suitcase, looked around and checked the locks, the agents in Atlanta had not made an independent decision that this person was suspicious. MT-48-49; T-27-28. Instead, the agents merely relied on the information from Agent Porro. MT-47-48; T-27-28. Based upon that information from Agent Porro, Agent Chapman had already made a decision to interview Petitioner in Atlanta. T-28; see also, MT-72.

After the still unidentified individual picked up the bag, he and his two companions walked toward an exit. MT-28. As the individual carrying the bag gave up the claim check to security, the other two persons preceded him outside the building. MT-28. After going through the claim check, Agents Chapman and Markonni approached the individual as he moved toward the doors and began their interview. T-28. As the officers stopped Petitioner, the other two individuals left. MT-30. The agents were dressed casually. MT-30.

While both had weapons, only Agent Markonni's weapon may have been visible. See, T-49; but see, MT-31, 49; T-8-9. As the agents approached the individual, they flashed official-looking badges and identified themselves as Federal narcotics agents. MT-31, 77-78; T-29.

They asked Petitioner if they could speak with him. MT-31; T-6. Petitioner said, "yes." MT-31, 78; T-7. Agent Chapman asked Petitioner for his airline ticket. MT-31, 78; T-7. Agent Chapman asked if Petitioner's first name was Ed. Petitioner said it was. MT-31; T-7. Agent Chapman then asked for some identification. MT-31, 33, 78; T-7. Petitioner produced identification which showed him to be Edward Lynn Rasnake. MT-33. The name on the airplane ticket and the identification papers matched. MT-33; see, in this regard, MT-49-52, 53-55. The agents did not know at this time that the name given by Petitioner was not in fact his real name. Agent Chapman handed the papers back to Petitioner. T-7.

Throughout this procedure Petitioner, according to the two officers, appeared nervous. MT-32; T-6. After these preliminary questions, Agent Chapman went further and explained to Petitioner that they were narcotics agents looking for people transporting drugs

through the airport. MT-33, 57; T-7. Agent Chapman then asked Petitioner if he was carrying any drugs on his person or in his luggage. MT-33. Petitioner said he was not. MT-33.

At this point, according to Agent Markonni, Agent Chapman asked Petitioner:

> "If he [Petitioner] would mind cooperating in allowing him to search his person and also his suitcase for drugs and narcotics. He indicated that it would, you know, just take a few minutes." MT-33, 57, 79.

In response, Petitioner said, "what's this all about?" MT-33, 57, 84. According to Agent Markonni, there was then a lull in the conversation which was filled by Agent Markonni when he said:

> "[L]ook, if you are not carrying any drugs or narcotics on your person or in your luggage, and if you will consent to a search, I'll be pleased to tell you exactly why we walked up to you. If you are found to be carrying something illegal, then I won't be able to tell you anything. Is that okay?" MT-33-34, 57, 84.

According to Agent Markonni, Petitioner said, "okay." MT-34, 57. Petitioner denies he said that. T-84. Rather, Petitioner contends that Agent Markonni said to him:

> "We can either do it in a more private area to avoid embarrassment to you or we can do it here. You know, it is up to you. Which do you prefer?" MT-58. See also, MT-33-34, 41, 84.

Petitioner then picked up the suitcase and prepared to leave. Petitioner recalls asking if the officers had a warrant to search the suitcase. MT-84. The agents said, "no." MT-84. Petitioner then proceeded to leave the airport, saying at this point, "I would rather go somewhere else." MT-33-34, 58.

According to Agent Markonni, it was one of those deals that kind of caught him by surprise and he walked out with Petitioner. MT-34, 58. Markonni said, "we can do it here if you want to do it out here, you know, there aren't many people out here anyway. You can just put your suitcase on the ledge." MT-34, 58; T-8.

Petitioner agrees that the officers did walk out beside him, but they then blocked his passage (MT-84-85). Indeed, Agent Markonni's answer to the following question seemed to support Petitioner's position:

> "Q. Is it not true. . .that if he [Petitioner] tried to run, he wasn't going to get anywhere?
> A. . . .he [Petitioner] could have gone backwards. There were only two of us, if it had wanted to run, he could probably have given us a good shot." MT-59.

Upon being stopped again, Petitioner was asked once more to open his suitcase and permit a search. MT-85. According to Petitioner, one of the officers said, "we

can either do this the easy way or the hard way." MT-85.

Petitioner didn't say anything, nor did he move towards the ledge. MT-35, 58. According to Agent Markonni, he just kept looking around and appeared fidgety as if he were going to take off and run. MT-35, 58. When Petitioner did not respond or make a move, Markonni asked him:

> "What's wrong?"
> "Is there something you are worried about in your suitcase?" MT-35, 60; see also, MT-85; T-8.

At this point, Petitioner said, "I might have something on me that might get me in trouble." MT-35, 60, 85; T-8. Agent Markonni then said:

> "I don't know what it is, you know, what's in your luggage, I don't. . .if there is some small amount of marijuana, I don't think you will have any trouble. . .you will have to come with us. We will take it, but. . .the United States Treasury doesn't want to prosecute someone for a small amount of marijuana and. . .the State attorney doesn't either. . .[I]f that is your concern, don't worry about it. . .[A]re you going to let us, you know, look in your luggage?" MT-36, 60-61.

Then supposedly Petitioner said he had some marijuana. MT-36, 60-61. Petitioner denies he said that. MT-85.

Markonni then supposedly went on to say:

> ". . .[I]f it is a small amount of marijuana, I think we can resolve the problem. . .[Y]ou know, we are not out here looking for small

> amounts of marijuana. . .[A]re you going to let us examine the contents of your suitcase and check you?" MT-37, 61.

Petitioner said, "no" emphatically. MT-37, 61. At no point throughout this so-called investigatory stop had the agents advised Petitioner of his rights under Miranda. MT-61. Nor at any time did they tell Petitioner that he did not have to submit to a search and he was free to go. T-62. Upon his refusal to allow the search, the agents then grabbed Petitioner, handcuffed him and took him to the Drug Enforcement Administration office at the airport to be searched. MT-37-39, 62; T-33. Upon that search of Petitioner, the officers found $25,000.00 in cash in Petitioner's boots, four suspected methaqualone tablets, and a couple of unidentified capsules.

After searching Petitioner, the agents then transported Petitioner and the still unopened suitcase to Clayton County, Georgia. The agents then prepared an affidavit which they did not sign. MT-13, 39-40. Rather, a Clayton County Deputy Sheriff, Johnny D. Roberts, was brought in specifically to sign the Affidavit. MT-17. The agents, principally Agent Markonni, briefed Deputy Sheriff Roberts on the situation. MT-11, 39-40. Deputy Sheriff Roberts had no personal knowledge of the information contained in the

Affidavit. MT-16, 42. Nonetheless, Deputy Sheriff Roberts signed the Affidavit and thereby swore to the truth of the facts therein of his own personal knowledge. MT-91-96; MT-16. The Affidavit was then presented to the Justice of the Peace, J. Davis Roberts. Neither Federal agent was asked about nor did they give any information to Justice of the Peace Roberts about the contents of the Affidavit. MT-42. A search warrant was issued, and the suitcase was opened and searched. Inside the suitcase, the agents found a substance which was suspected to be in violation of the Georgia Controlled Substances Act. Upon that evidence, Petitioner was indicted, tried, found guilty and this appeal has followed.

During the Motion to Suppress, the Appellant gave testimony and upon cross-examination by the State the following ocurred:

Q. The Samsonite case, was that your suitcase?

A. Yes.

MR. MARGER: Your Honor, at this point I would like to object to any questions that do not deal with the actual arrest issue. They are irrelevant and I think the District Attorney knows well that they are infringements on the rights against self-incrimination, both in this state and the United States, and we object on the grounds of the Fifth Amendment.

MR. LISTER: Your Honor, the suitcase is alleged in the search warrant and there is testimony that this man was in possession of the suitcase. The Defendant's Motion to Suppress claims a possessory interest in that suitcase. I contend the question is relevant. If he wants to claim the Fifth Amendment privilege, it is for the Defendant to claim and not Defendant's attorney.

THE COURT: Objection is overruled.

CROSS (Contined):

BY MR. LISTER:

Q. Was the suitcase yours?

A. I would like to claim the Fifth Amendment.

MR. LISTER: Your Honor, I have a Motion.

THE COURT: State your Motion.

MR. LISTER: Your Honor, I move to strike the Defendant's testimony inasmuch as the State is being denied a thorough and sifting cross examination upon the Defendant's claiming the Fifth Amendment to rights.

THE COURT: What do you say, Mr. Marger?

MR. MARGER: Your Honor, the State does not have an inherent right to cross-examine on all matters concerning this case. They are exactly in the same position that the Defendant is in. It is not a case of discovery nor is it a case of making the evidence available to the State that they otherwise would not be entitled to. It is a violation of the Fifth Amendment. This man is willing and able to testify to all matters concerning his arrest at the time he was stopped as far as the arrest itself was concerned. There is no question but that the suitcase is an important part of the case in chief but it is not an important part of the question as to whether or not a Motion to Suppress should be granted on a legal arrest. To grant the Motion as stated would be to deprive the Defendant of a basic right.

THE COURT: I find the question is relevant to the matter pending before the Court. The Defendant can either answer the CROSS (Contined):

BY MR. LISTER:

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THE COURT: I find the question is relevant to the matter pending before the Court. The Defendant can either answer the question or can exercise his Fifth Amendment right. If he exercises his Fifth Amendment right, it would subject all of his processing and it will be excluded. Do you wish to confer with your client before the Court proceeds.

MR. MARGER: Yes, Your Honor. May I?

THE COURT: You may do so.

(Thereupon the defense lawyer, Mr. Marger, conferred with the Defendant on the stand after which the following transpired):

MR. MARGER: Your Honor, if Your Honor pleases, although we accept to the

Court's ruling that we have only those two alternatives, we will at this time decline to further answer any questions based on the Fifth Amendment.

MR. LISTER: Your Honor, I would like for the record to hear from the Defendant.

THE COURT: Have you had sufficient time to confer with your attorney?

MR. RASNAKE: Yes, sir.

THE COURT: You wish to claim the Fifth Amendment?

MR. RASNAKE: Yes, sir.

THE COURT: All right, Motion to Exclude his Prior Testimony is hereby granted. You may go down and have a seat by your attorney. It will not be considered by the Court in this Motion.

MR. MARGER: We rest Your Honor." MT-86-89.

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